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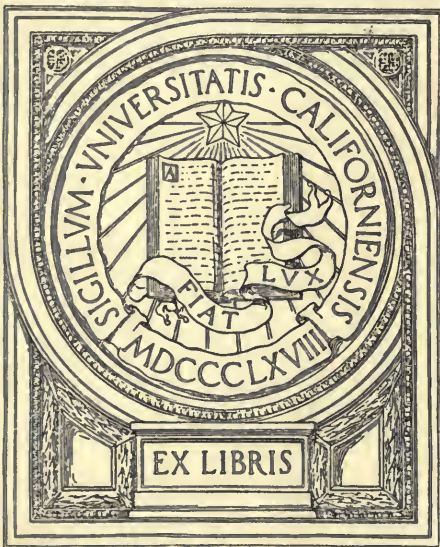
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Bar Association

of San Francisco

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At a Meeting of the Association held at the
Hotel St. Francis

Thursday, March 24, 1910

After-Dinner Proceedings

OF THE

Bar Association of San Francisco

AT THE

Hotel St. Francis

San Francisco, California, Thursday Evening,
March 24, 1910

CURTIS H. LINDLEY, Esq.

President Presiding.

SPEAKERS:

COURTENAY DE KALB, ESQ.

HON. F. M. ANGELLOTTI,
Associate Justice Supreme Court.

HON. U. S. WEBB,
Attorney-General.

SETH MANN, ESQ.

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1910

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After-Dinner Proceedings

THE PRESIDENT: Ordinarily the President of this Association is supposed to make an address at the beginning of the literary exercises of the evening. There will be a pleasurable disappointment in that respect for you this evening—there will be no set address by the President. We have too much of interest before us.

There are one or two things, however, in connection with a subject in which we are all interested, that I think it worth while to say to you at this time.

In an address that I indiscreetly delivered before the Commonwealth Club of the city of San Jose the other evening I referred to a distinguished professor of a distinguished university in their midst as having given an epigrammatic solution of all the troubles to which the lack of administration of the law are due, and that was to "hang a few lawyers". The statement was made by Professor Bert Estes Howard in a lecture delivered before a woman's club in San Francisco. Mr. Cahill, who edits a very interesting page of the "Sunday Call", unfortunately ascribed that remark to Professor Boke of the University of California.

I stated, in criticizing this epigrammatic suggestion of a method of release from all our troubles that the distinguished professor was talking to an assemblage of ladies who might possibly feel that he was either inspired, or had so deep an insight into the sociological situation that the execution of his sentence of extinction might justifiably take place immediately, and made some other irreverent remarks with reference to the distinguished philosophic utterances of the learned professor, stating that the members of my profession looked upon a philosopher as one who could bear with resignation the troubles of other people. And to see the name of my good friend, Professor Boke, mentioned in the article as it appeared in the "San Francisco Call", as being responsible for the epigram was a surprise to both Professor Boke and myself. The economists from the outside can criticize the law and not be amenable to any severe castigation at the hands of the lawyer, but when one of my own profession is charged with suggesting so fatal a remedy as "hanging the lawyer" it is time that somebody stood up in defense of the profession. I think the remarks of Professor Howard

were prefaced with the statement "that if we had a few more hung lawyers we would have less hung juries".

That suggests to my mind that there are others besides lawyers in the body politic inquiring into the functions of the lawyer. The attitude of the lawyer, both as an individual and in his collective capacity, is being studied for the first time by the economist and by the sociologist. We find within our own particular domain no patent right to exclude everybody else from discussing the attitude of the lawyer toward the public. Nor have we the right to say that we alone are to determine the position we shall occupy as a civic factor. Our acts are being criticized from without and we should heed the warning that comes even from a professor of economics in a learned university who expects to retire some day into the shadow of the Carnegie Foundation. As I have had occasion to say before, there is no Carnegie Foundation under which the superannuated judge or lawyer may rest.

We have to meet these problems, gentlemen, sanely, intelligently and earnestly. We cannot dismiss the criticisms that are being passed upon our profession by the incumbents of the chairs of sociology and economics, or by occupants of the chair of psychology in Harvard University, who has also a remedy for all our troubles, namely the introduction of the psychological expert, who will determine whether a witness is telling the truth.

So we see, in the large range of view of the subject, that we must get out of the narrow compass in which we move and look at the psychological problems that are involved. Other people look at them and from varied viewpoints. Why should not we take another viewpoint from which to scan the situation?

I do not know but what some of my indiscreet utterances may lay me open to the charge of presenting a propaganda not altogether professional, and which is somewhat psychological. I want to assure the members of the Association who have been kind enough to entrust me with the destinies of the Association as presiding officer during this term that I am not a socialist, although I think we will all have to alter our definition of "socialist" as given in the first instance. But I have had occasion to say, as I said in my address at San Jose—and think I have said it before this Association—that some of our laws are framed upon an individualistic theory that was pertinent in the seventeenth century, but which is not pertinent to the twentieth century by reason of the social evolution which has taken place; and that the proposition of looking at men as groups instead of as individuals

is forcing itself upon the attention of the intellectual world today.

I may cite as an illustration of the evolution of things, the fact that the House of Lords and the Commons and the whole body politic of England has been in a turmoil over a principle which was practically reiterated—reiterated, not born, because it was born before Henry George, a journalist of this city, wrote "Progress and Poverty". It shows the advance of civilization, shows the manner in which they deal with the subject in Germany, and France, and Belgium, and England, upon the collective theory, whereas we deal with the problem entirely from the standpoint of individualism.

I am not for a moment establishing a propaganda that we should disregard the essential necessity of individual initiative. From the beginning of human society, every individual has to surrender something for the benefit of all mankind, or those of the group to whom he immediately belongs. And the question as to how much he shall surrender cannot be mathematically stated at any period in the world's history. It has to be determined by the state of things as they exist, and that is the limit to which I go in my advocacy of the recognition of collective spirit, particularly when it comes to the administration of criminal law.

Emphasizing the suggestion that there are other groups of men learned, earnest, honest, looking into this profession as a civic factor in the development of civilization, in the advancement of civilization, in the advancement of all that is good, in the seeking of higher ideals, I have come in contact with a number of men, not of my profession, who have something of foresight, something of judgment, to which we ought all to listen; some who have studied it from both outside the professional line of development and inside that line. I have the pleasure of announcing to you something not on the program tonight that came to me as a matter of inspiration. We have with us this evening a guest with whom I have discussed these questions "in the closet," a mining engineer of large experience, the editor of the "Mining and Scientific Press," who can see as far into the future as any of us are permitted to see from a rational viewpoint, and to correlate things that are coming along in our profession as they affect not only the good and the welfare of the general public, but the profession particularly.

I wish to say that the gentleman I am going to introduce to you had no warning that he was to be called upon, until I asked him this evening as we came into this banquet room if he would give us his idea and his views somewhat on the lines I have discussed, the view of our profession from the out-

side, and he has kindly consented to do so without previous preparation. I have the privilege of introducing to you Mr. Courtney De Kalb, of the "Mining and Scientific Press".

Address of Mr. Courtenay De Kalb

Mr. President and Gentlemen of the Bar Association: I very reluctantly consented to say a few words here to-night, and I promise you that I shall make them very few. Indeed, I must apologize for even attempting to address an audience, for that is not in any sense my vocation, nor even my avocation. In asking me to discuss the subject of collectivism, Judge Lindley has asked one who is quite likely to take an opposite view from his own, for the Judge has been brought up in the centers of civilization, while I am essentially a frontiersman.

I think that the experience a man acquires on the frontier necessarily causes him to pay a great amount of respect to the rights of the individual—much more so than in the case of one who has been brought up in the centers of civilization. He comes to appreciate individual initiative and individual prowess on the frontier, and he comes to think less of it where he is not called to depend so much upon the unit as upon the mass. There is such a thing as "mass action" socially, just as there is chemically; there are changes occurring which are proportional to the products of the masses taking part in it. This is part of the cause of the complexity of social problems, and of the difficulty of determining the course of social evolution as a logical process. There are surprises, inexplicable phenomena—the vagaries due to "mass action," which here means the shifting balance of preponderating sentiment at different times. Thus we can not predict; we can not be sure that we or any other men, or body of men who take the task upon themselves, are directing the forces of civilization in any particular direction. We can study what has been done; we can measure the size and strength of the stones that have been set into the social structure. And it has been borne in upon me that the courts have had more to do with this final work as social artificers than any other single agency. It seems that we cannot regard anything in our civilization as essentially fixed until it has been fixed by the courts—until it has been winnowed, and tried, and tested by the judicial safeguards of our civic life. There is eternal shifting, tidal ebb and flow in the great sea of social existence where men are struggling. In this ceaseless effort, which is an effort always for the future, and therefore progressive, something must line up the flood into a definite current, a consciously purposeful stream; and the force that does it is the force we admit as final, before

which we all bow at last, namely, the decisions of the Judges. We do not know which way we are going until the courts have decided which way we *may* go.

The decisions of the courts have determined for us, I think, in later years, that the individual is less to be regarded than the mass. I believe that spirit is growing in the West more than it is in the East. That is because the West is feeling the influence of social aggregation after that period of intensely individualistic effort which is needful for pioneer development; but on the other hand it represents relaxation—it means transference of power from the atomic unit to the molecular unit. I am not saying which is better; I am pointing out a fact, and a great fact, fraught with mighty consequences. In proportion as we lose the influence of individual initiative we lose something that has made heroes, brave men, doers of wonders that will remain an inspiration to all times. There is the reverse side of this picture, to-wit, the individual brute, trampling on the rights of other men. Are we sure that collectivism will not possess its collective brutality, its collective disregard of your rights and my rights, and those of your children and mine? But these changes are inevitable; the world will go as it listeth, as the wind blows, but the courts are our barrier-walls and wind-breaks to protect our homes, to give us the shelter of peace and security in the divine right to wrest out of the turmoil of life the only thing worth living for—happiness!

I said that the tendency away from individualism was growing in the West. I may illustrate it from events in the mining world, for I must perforce look at this world through the spectacles of an engineer. The West drew its initial strength from the mines, and the balance between the output of the mines and that of the farms is something that it is worth while to maintain for a long time to come if industrial conditions in the West are to remain universally healthy. There has been a tendency to grant that mining corporations may take precedence over individuals in right and privilege. I think that we have to admit that the welfare of the community is necessarily to be cared for by the courts, rather than to have our rights looked after by the individual. In a recent decision, which I believe is going to be reviewed again in this State, it being rendered originally in Montana, the doctrine of the greatest good to the greatest number was set forth in the clearest possible terms. It was a decision by Judge Hunt in the famous Anaconda smoke case. There was the question of shutting down a smelter, which involved the cessation of mining operations and the throwing out of employment of something like twelve thousand men, involving indirectly a

population of about forty thousand people. There was no doubt in the world that the surrounding farms were being damaged. At first the injunction was granted, and then the injunction was set aside on the ground that a few could not take away food from so many mouths; and that was done in entire disregard of ample proof that damage was being done and that the continuance of farming was prejudiced throughout a large range around the smelter.

The question of the rights of individuals in Arizona was dealt with in a different way. A decision recently in the Arizona Supreme Court, in connection with the Arizona Copper Company, recognized the right of the farmers; yet that decision has been set aside, pending appeal to the Supreme Court of the United States, so that an effort on the part of the judiciary to protect the individual in Arizona has so far failed.

I have been interested in noting in the court decisions this tendency to exalt the general proposition of the greatest good to the greatest number. My feeling has been that while that must necessarily go on, while we will continue to tenderly regard the mass, at the same time we must be very careful that we do not lose sight of the units which make the mass. (Applause.)

THE PRESIDENT: After all is said and done, after something over a year's experience in trying to point the way to something better, so far as our profession is concerned, and after studying all the contemporaneous literature on the subject that is being written and produced in the different sections of the United States, I remain of the firm conviction that any reform in connection with our judicial system, of the administration of justice, the raising of the standards of the profession, must come from the elevation of the individual lawyer (applause), and that whatever effort we may make in any direction, we must have that as the objective. We will only reach a position of distinct advance when the profession has placed itself before the public so that it is recognized as a civic factor and that can only be done by raising the standard of professional ethics.

The next figure will, from the viewpoint which it has not been my privilege, except for a very short and insignificant period, and then only on the trial bench, to occupy, and from which to view the law, speak to you of the shortcomings of the lawyer. And I know of no one who is so well and thoroughly able to tell you of the lawyer's shortcomings and the possibilities of good by their correction, as a judge of our highest court, present here this evening—I refer to Judge Angellotti of the Supreme Court. (Applause.)

Hon. F. M. Angellotti of the Supreme Court on "Some of the Duties of the Legal Profession."

MR. JUSTICE ANGELLOTTI. Brethren of the Bar: To those who know me, it is probably needless to say that I occupy a position at this table this evening somewhat under protest. My good friend, Judge Belcher, the Chairman of your Committee on Entertainment, persuaded me, however, that it was my duty to accept the very kind invitation to participate in your program, and so I am here. I have, however, avoided a great deal of worry by writing down what I propose to say, and I hope you will pardon me for reading it.

"Some of the Duties of the Legal Profession"

I cannot hope to say much that is new upon the subject concerning which I shall ask your attention for a few moments. But it should play such an important part in the discussion that is now being had throughout the country as to the necessity of reform in the law and its administration, that I feel that a few words in regard thereto, even though but reiterations of truths that have been uttered many times before, may be of some interest.

From all parts of the United States we hear loud and serious complaints regarding our system of law and the manner of its administration. It is patent to any one who considers the matter at all that popular confidence in the efficacy of our system to do prompt justice, or indeed to do justice at all in many cases, is very much shaken. It is needless to point out why nothing could be more deplorable for any country than such a condition of mind on the part of its people. While we all know that we are living in an age in which opinions are often hastily expressed without a full understanding of the facts essential to a comprehension of the questions involved, and that this condition of the public mind in regard to the law and its administration has been intensified to an extent out of all proper proportion to the real defects by many most unjust accusations and criticisms, we also know that there is much ground for complaint, and that the results in the administration of the law are not in all respects what they should be. The people have the right to demand as speedy and efficient an enforcement of the law, both civil and criminal, as is consistent with such rules as may be essential to the doing of justice. They realize the absolute necessity of a system that will produce such

results, and they have always shown their willingness to bear whatever expense may be necessary to maintain and administer such a system. When we contemplate the harassing delays and the other obstructions that in all parts of the country have become so common in the administration of the law, practically amounting in very many cases to an absolute denial of justice, we are forced to admit that the people are not getting the best that we are able to give them in this regard. I say "we" because it is to our profession that the people have the right to look and to a great extent must look for such reforms as are necessary in such matters, and because for such real defects as exist our profession is largely responsible. It is not my purpose here to attempt to point out wherein there are such defects that can be remedied, or what the remedies should be. These are matters concerning which there is the greatest difference of opinion among lawyers. The thought that I am endeavoring to express is simply that it is our duty as a profession to ascertain as far as we can wherein our system is imperfect, and wherein the remedy, if any, lies, and with the knowledge derived from careful investigation and earnest consideration, to give our best efforts in the direction of the accomplishment of necessary reforms. So much, at least, is due from us.

And first of all, pursuing this general thought, a great responsibility rests upon us in the matter of law making. While the legal profession is not the law-making power of our government, national or state, by reason of their more adequate knowledge as to what is necessary to make the law accord with what is right and essential to the doing of justice under the conditions existing in their own time, and by reason of the influence which they must have if they live up to the traditions of their profession, lawyers can and should be a great factor in the making of proper laws. They undoubtedly will be held responsible for the condition of the law, although they do not constitute the direct law-making power. As was well said by a recent writer on this subject: "It may be confidently assumed that there is no disagreement among us on the proposition that our profession, as well as any other, is the responsible battalion for those interests of the day and generation in which it specializes. We should unhesitatingly hold the state of medical knowledge and practice to be the honor or reproach of the medical profession as a whole; and the state of any other science or business is generally held to be the honor or reproach of the whole body of men who profess it." We can conceive of no higher duty on the part of lawyers than that of making every legitimate effort to procure the enactment of such laws as are essential

to the perfecting of our system and the making it adequate to the ideas and demands of our age. We owe that duty to our country because it is vital to our country's interest that it should have as perfect and efficient a system of law as can be devised, and because we are able to assist in that work by reason of the knowledge we have, or at least should have, concerning the subject matter. It cannot be disputed that if we are to live up to the obligations of our citizenship we must give to our country the benefit of our efforts and influence in this regard. And we owe that duty to the profession of which we are members that it may not be discredited by men, and found inefficient for the performance of the functions for which it is designed.

What I have said in regard to our duty in the matter of law making, though not confined to laws relating simply to procedure, is specially applicable to such laws, for as to these the people must necessarily look to those peculiarly fitted to advise by reason of their knowledge and experience. We know as a matter of fact that there are few laws relating to procedure the enactment of which is not due to the influence of the legal profession. The question then should be continually before us whether the system of procedure declared by our written law, is in any way defective, and what, if any, changes should be made in order to make it more conducive to the ends for which it is designed. This is a question that calls for the most serious consideration before any particular change is decided on as desirable, for one of our most serious evils is hasty and ill-considered legislation. It will not be disputed that laws relating to procedure should be as simple as is consistent with the nature of the subject to which they relate. There are very many who believe that our statutory regulations in this regard are too numerous and complex, and that by reason thereof much unnecessary time is lost and unnecessary expense imposed in the conduct of a cause, and also that by reason thereof the real merits of the controversy are too much subordinated to the determination of questions of mere practice. We have no less an authority than that distinguished member of our profession, President Taft, declaring as follows: "The codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English courts, most of which is framed by rules of court." In the report of the committee appointed recently by the American Bar Association to suggest remedies and formulate laws, we find the following: "A statute going into minute detail to begin with, soon to be swollen by legislative additions and overgrown with

amendments and a gloss of judicial decisions, is not the practice act of the future. The ideal would be a clear and scientific outline, laying out the limits and the lines of procedure, to be developed by rules of court which may be enacted, revised or amended or abrogated by experts as the exigencies of judicial administration demand." It is obvious that the more simple the rules relating to procedure, the less would be the time devoted in the courts, both *nisi prius* and appellate, to the consideration and determination of questions of practice, and the greater would be the opportunity for a prompt determination of a case on its merits. But as said before, it is not my purpose tonight to discuss the merits of any suggestion or recommendation regarding the matter of changes in these laws. What has been said in that behalf has been said solely with the view to emphasize the necessity on our part, if we would discharge the obligations resting on us as members of our profession, of constantly endeavoring to give to the state as perfect and efficient a system of practice as we can. There are those who assert that the lawyers deliberately use their influence in the matter of legislation to render the law as complicated and confusing as possible, on the theory that such a condition is more conducive to complicated and profitable litigation, that is, profitable to the lawyer if not to the litigant. While such a charge deserves no notice, it is probably true that the profession as a whole has been negligent in not giving more attention to this matter. In this commercial age the busy lawyer, like the busy member of any other profession or calling, is often so engrossed with his own personal and business affairs that he has little time or disposition for the service of the state or his profession. But it is encouraging that all over the United States the lawyers are awakening to the necessity of giving more of their time and attention to this matter, and nowhere has their disposition in this behalf been manifested to a greater degree than in our own state. Within a few years two great reforms designed to obviate unnecessary delay in the final determination of causes, an evil, than which there is none greater, have been accomplished. The first of these was the constitutional amendment establishing our district courts of appeal and prescribing their functions. The system thus established has proved all that was claimed for it by the lawyers of this state, who themselves designed it and to whose advocacy and influence its adoption must be credited. The work done under this system in the few years the new courts have been in existence was carefully set forth in a paper recently read by Justice Lucien Shaw before the Los Angeles Bar Association. The actual practical result of

the greatest interest and benefit to the people generally is that the time between the date when the record on appeal is filed and the date when the cause is brought to a hearing in the appellate court has already been reduced from three or four years to about six months. At the recent January session of the supreme court there were civil cases upon the calendar for hearing that were there solely because they had been reached in ordinary course, in which the record on appeal had been filed as late as July, 1909. It is now apparent that by reason of this amendment, the time will speedily arrive, if indeed it has not already arrived, when an appeal may be heard by the proper appellate court (supreme or district) at the session next following the filing of the record of appeal and the lapse of time allowed by the rules for the filing of the briefs of counsel. The second of these reforms was one designed to make for greater expedition in the matter of bringing to the proper appellate court the record to be used on an appeal in a criminal case, to prevent as far as it was possible by written law to do so, the lapse of a long period of time between a verdict of conviction of a public offense and the determination of the cause on appeal. The delays that had occurred in this regard were a standing encouragement to crime and a reproach to our civilization. The new method has not been in force long enough to demonstrate its effectiveness, having been enacted into law only at the last session of our legislature, but I have no hesitation in asserting that while there are doubtless some minor defects therein, it will be found to accomplish its primary object, and that it will do so without endangering in the slightest degree any substantial right of any person charged with crime. Delay in the disposition of appeals in criminal cases can be still further obviated by a rule of court requiring every such appeal to be heard, unless good cause to the contrary is shown, on the first motion day of the court after the filing of the record. I am of the opinion also that it would be conducive to a speedier and more satisfactory determination of criminal appeals if the law were so amended as to make it the duty of the district attorney of the county from which the appeal is taken to participate in the matter of the appeal in conjunction with the attorney-general, at least to the extent of making that officer acquainted with such of the facts thereof as are necessary to enable him to promptly present such argument as is desirable in the appellate court. These two reforms already made are referred to solely as instances of work recently done by the lawyers of this state in the matter of legislation designed to make our system more effectual for justice. That the members of our profession in

California are awakened to their responsibility in this matter is shown by the interest that is now being manifested therein by members of this Association and those of the Los Angeles Bar Association, and also by the recent institution, under the most favorable auspices, of the California Bar Association, one of the declared objects of which is "to cultivate and advance the science of jurisprudence", and "to promote reform in the law and in judicial procedure." As was recently said by Mr. Richard Olney, in addressing the new State Bar Association of Massachusetts, in such matters "only a Bar Association which is representative of the entire body of lawyers of a state can speak with the necessary authority or can hope to have the necessary influence."

Probably more important, however, than any other obligation resting upon us is that of doing our utmost to create and maintain a high standard of ability and conduct on the part of our members, both at the bar and on the bench. Given the best system of law attainable, the nature of the subject matter is such that much must necessarily be left to the industry, intelligence and honesty of those who are to assist in its administration. To the extent that these fail in their duty in this behalf, by just so much will the efficiency of the whole system be impaired, and to the extent that it is so impaired will the profession be justly discredited. It goes without saying that our judges should have the capacity to discharge the important duties devolving on them and the determination and ability to discharge those duties with the most absolute fairness and impartiality, and that they should assist in maintaining respect for our laws and our courts by such a course of conduct as is best calculated to avoid even a suspicion of partiality or improper influence. Without competent and impartial judges a satisfactory administration of the law is, of course, impossible. There are none so capable of determining who are by character and mental qualifications fitted to act as judicial officers as are the members of our profession, and there are none who should be more interested in maintaining the highest standard in regard thereto. The influence of the profession in this direction if wisely and impartially exerted should be most effectual, provided it has the confidence of the community in its sincerity and purity of motive to the extent it should have. And as it is likewise essential that the judges should have to as great an extent as is possible the confidence of the general public in their integrity, impartiality and ability, the influence of the profession should also be steadily exerted in maintaining that confidence wherever they believe it to be warranted. To maintain the respect due to courts of justice and judicial

officers is one of the obligations imposed by our statute on all persons admitted to practice law, not because of any particular consideration for the persons who happen to occupy judicial office, but because it is essential to any reasonably adequate system of administering justice that the arbiters whose decisions are to settle controversies should not only deserve to have the confidence of the community, but that they should have it.

To quote from the report of the Committee appointed by the American Bar Association to report a code of ethics for the legal profession:

“The purity and efficiency of judicial administration, which, under our system, is largely governmental, depends as much upon the character, conduct and demeanor of attorneys . . . as upon the fidelity and learning of courts, or the honesty and intelligence of juries.”

Those who have any proper conception of the true functions of the lawyer know that he is bound by every consideration of loyalty to his country and to his profession to assist in maintaining the law in its integrity, and to abstain from any act designed to obstruct or prevent the prompt determination of a cause in accord with the law. He owes no duty to his client that is paramount to this. The lawyer who regards himself as simply a personal employee or retainer of his client, whose duty it is, by every artifice of which he is capable, to assist the client in circumventing and evading the law, has no proper place in our ranks, and the sooner he is removed therefrom the better it will be for our profession and society. To quote again from the report of the American Bar Association Committee such lawyers “not only lower the morals within the profession, but they debase our high calling in the eyes of the public. They hamper the administration and even at times subvert the ends of justice.” It is doubtless true, notwithstanding the widespread idea of the public to the contrary, that there are comparatively few members of the bar who would designedly allow themselves to be used for any such purpose, and I have no hesitation in asserting that there is no profession or calling that numbers among its members a greater proportion of high minded and patriotic citizens, men who have the most exalted idea of the dignity and honor of their calling and who would not consciously act in a manner subversive thereof. However, to quote again from the report of the American Bar Association Committee:

“We cannot be blind to the fact that however high may be the motives of some, the trend of many is away from the ideals of the past, and the tendency more and more to reduce our high calling . . . to a mere means of livelihood, or of personal aggrandizement.”

Can we doubt for a moment the difference it must make in the efficiency of our legal system for justice and in the attitude of the people toward the law and the courts and the bar, if members of the profession generally constantly live up to the obligations imposed upon them as lawyers, and publicly place the ban of their disapproval upon those who do not? There is no higher standard established for a lawyer anywhere than that prescribed by the portion of our own Code of Civil Procedure that enumerates his duties, duties that each person admitted to the bar solemnly promises to perform. With one exception it is the same as the provision of the Alabama statute on the same subject, the statute taken by the American Bar Association as the basis for its Code of Ethics, and that exception consists in the addition of an important requirement. By our code provision it is declared to be the duty of a lawyer to support, not to seek to evade or circumvent in the interest of a client, the constitution and laws of the United States and of this state—to maintain the respect due to courts of justice and judicial officers, which implies that he shall be guilty of no act tending to bring the courts into disrepute—to counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense—to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law—to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client—to abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged—not to encourage either the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest,—never to reject, for any consideration to himself, the cause of the defenseless or oppressed. These are the specific obligations that all of us have assumed, and that, as honorable men, we are bound to fulfill. They should be graven upon the heart of every lawyer and should constitute the rule of his life as long as he pursues his chosen calling. It is a high standard that is thus established, but it is not at all

impossible of attainment. To its attainment by any lawyer nothing is essential but common honesty and the ability to think clearly and right. No duty of the profession is more important than that of maintaining a full realization on the part of the lawyers generally of the nature and extent of their obligations to society in the matter of the administration of the law, and a determination on their part to live up to these obligations. Nothing is more essential to the purity and efficiency of judicial administration.

I have spoken in a very general way of some only of the duties of the legal profession. In closing I wish simply to add that it is upon such associations as this and our new State Bar Association that we must largely rely for effective work in the direction suggested. It would appear to go without saying that every true and loyal member of our profession should be an active member of some such association, and contribute his counsel and best efforts to such work as can be efficiently done only by means of such an organization. The results that would thereby be attained would be easily worth every sacrifice made—they would redound not only to the credit and glory of our profession, but to the everlasting benefit of our beloved country. To use the quaint words spoken by Chief Justice Emery of Maine:

“There is nothing in this world better than justice. There is nothing in this world worse than injustice. He who shall remove some cause of injustice, or who shall make more straight and easy the road to just judgments, will confer more good upon mankind than even he who shall make two blades of grass grow where but one grew before.”

THE PRESIDENT: In speaking of the viewpoint from which these subjects are to be discussed, it is a marvelous opportunity that one has, if he has served in different capacities, as lawyer at the bar, judge upon the trial bench and judge of the Appellate Court. The trial judge deals with the jury. After something over thirty years on the firing line, handling probably as large a variety of cases as comes to the lot of the individual lawyer, and having for a very short period of time, by the grace of a tragedy, occupied the superior bench of this State, I have some preconceived notions about our jury system.

One morning in the month of May in a certain year many years ago, I think it was 1883, although I have forgotten definitely, a judge of the Superior Court of this State was found dead on his porch with a bullet hole in his head. The

bar was divided. Some said that he committed suicide and some said that he was murdered. At all events, the Governor circulated a reward for the arrest and conviction of the parties who committed the crime. I was appointed to succeed that gentleman, and for a period of a few months occupied the bench of the Superior Court in one of the mountain counties. My first experience, from the viewpoint of a trial judge, occurred during my short incumbency upon that bench.

The first case that I submitted to the jury was an important murder case, and I naturally had, as any young lawyer would have—I think Judge Sullivan and myself at that time were the youngest superior judges on the bench of the State—I had that anxiety and was very particular to see that the charge the jury should receive from me would be properly shaped. I had the terror that every superior judge has, and which he ought not to have, in instructing the jury—terror of a threatened reversal. It was said by a wag down in Georgia, sitting on the Supreme Court of that State, that some courts sit for the sole purpose of reversing the errors of the other courts and adhering to their own. I venture to say that 99 per cent of the young lawyers who occupy the bench are afraid of their shadows when they are first called upon to instruct a jury.

This was a murder case, a vulgar, common one, where a man had been shot in the back, or shot through cowardice. The man was afraid of his life, and he was not pressed to the wall and had no business to kill, but he killed. Before I instructed that jury I spent nights and days in trying to find out what the law was and how far I might go in instructing that jury, always looking to a possible reversal by the courts above, knowing that my career was short and desiring to have the reputation of not being reversed by the appellate court. I framed my instructions according to the strict letter of the law, as I believed it to be, before a set of jurymen the peers of the defendant and who were supposed to take their wisdom and gospel from the court. The jury went out and they stayed out for a long time. In my judgment there was no reason for them to so stay out, but they ultimately came in and asked for further instructions on the part of the court. I said to the foreman of the jury "Do you desire any further instructions from the court?" He said, "Yes, we do." He was a tall Kentuckian, and had once been a justice of the peace, and during his odd times at that time was sawing wood in the neighborhood for an honest living. He said, "Judge, what we would like to know is, if we find

this man guilty, how long you will send him to the penitentiary for?" I said, "Gentlemen, have you heard the instructions of the court?" "Oh, yes, we understand the instructions of the court, but we would like to know how much you are going to give the fellow." I said: "Gentlemen, you have to follow the instructions of the court. As to the punishment that is to be meted out in the event that you shall find this man guilty, that is a question that, under the laws of the country"—and I said this in a very dramatic tone—"devolves upon the court." The jury retired and I found out what happened a little later. The foreman of the jury said to the assembled jury after they had again retired: "Now, you see that judge, he will give this fellow the full penalty of the law." And therefore they acquitted him. (Laughter.)

On this question of instructions to the jury, the viewpoint is everything. After these thirty-five years on the firing line I have my own views, as I state, of the question. But I am sure the subject will be illuminated to the Association from the viewpoint of the Attorney-General of this State in a most interesting way and one of which we may take notice. I have the pleasure of introducing to you the Attorney-General. (Applause.)

Hon. U. S. Webb, State Attorney-General, on "Instructions to Juries."

ATTORNEY-GENERAL WEBB. Mr. President and Fellow Members of the Bar Association: It may have occurred to you that but little can be said upon this subject, and, if such be true, that fact furnishes ample justification for its selection.

My remarks this evening will be directed to this subject mainly because of the receipt a little while ago from this Association of this circular letter:

"Dear Sir: This committee is informed that in at least one of the United States it is not the practice to instruct the jury in criminal cases, but that the jury is the judge of the law and the facts.

"We recognize that reversals on the ground of errors in giving, refusing or modifying instructions are quite frequent.

"Will you kindly inform us:

"1. Are instructions required by law in your State?

"2. Reference to the statute governing the same?

"3. If instructions are required, what is your experience with respect to reversals for errors in instructions?

"4. If instructions are not required, what is your experience as to the efficiency of the law with respect to the conviction of criminals, and the justness of verdicts?"

"5. What is your opinion with respect to the necessity of instructions in criminal cases?"

"6. If you deem instructions necessary, what, if any, limits do you think should be placed thereon?"

"Any information that you deem of value to the committee, in addition to the answers to the foregoing questions, will be much appreciated."

As reply to this letter has not heretofore been made, this occasion offers an opportunity for the performance of a double service.

You will note in this letter the unhesitating declaration: "We recognize that reversals on the ground of errors in giving, refusing or modifying instructions are quite frequent," and the questions following that declaration are evidently designed to elicit information which will enable the Bar Association to recommend such changes in the law as, in its judgment, will most fittingly avoid these frequent reversals.

Under the wisest system that may be devised by finite minds, it could not be hoped that reversals would be entirely avoided. Perfection is found alone in the infinite, but as time progresses it is not too much to hope that our systems of procedure will approach more and more nearly perfection.

This letter, you have noted, is limited in the scope of its inquiry to instructions in criminal cases, and evidently its author entertained no manner of doubt that reversals in criminal cases in this jurisdiction because of errors in instructions given, or errors in refusing instructions requested were very frequent.

It is not surprising that men whose occupations lead them along paths other than those of the legal profession should have this belief, whether such belief be founded in fact or otherwise, but it might properly occasion some surprise to lawyer or layman that members of the legal profession, practitioners in this State, should entertain the belief that criminal cases in our courts are frequently reversed because of erroneous instructions given, or errorless instructions refused, if such be not the case.

I never see the faith of another shattered without a feeling of sorrow; I never see another's idol topple over without a feeling of regret, but if the faith be not well-founded, or the idol be a false one, neither should endure.

Upon the receipt of this letter, I felt that there was much doubt of the correctness of the facts assumed by the writer,

and this led me to a brief investigation of the subject. That investigation discloses some interesting results, not all of which are pertinent to this particular subject, and not all of those which are pertinent need here be given.

I found that during the last four years the appellate courts of this State (and in that term I include the Supreme and the District Courts of Appeal), have finally determined 211 criminal appeals. These appeals involve practically every criminal charge known to our statutes, and very many more than were known to the common law.

In each of these cases juries have been impanelled, evidence introduced and the jury thereupon instructed as to the law which should guide them in reaching their determination. The records show that the time required by the court in delivering its charge in these several cases must have varied from a few minutes to a few hours, and even the most unskilled and unwary in the practice of criminal law must know that the probability of error in instruction grows with the length of the charge, and many of the charges which I have examined were abundantly long enough to have contained a far greater number of errors than were actually found therein.

Of the 211 cases passed upon by the appellate courts during the period mentioned, 39 were reversed and 172 were affirmed; $81\frac{1}{2}$ per cent affirmed and $18\frac{1}{2}$ per cent reversed, or, $81\frac{1}{2}$ cases out of each 100 were found free from reversible error, while in $18\frac{1}{2}$ cases out of 100 error which, in the judgment of the court, had prejudiced the defendants' rights, was disclosed.

Affirmance, of course, is a declaration by the reviewing court that no error prejudicial to the rights of the defendant was found in the instructions given to the jury, or elsewhere in the record. The reversal is a declaration that the record of the trial disclosed error or errors prejudicial to defendant's rights.

It has struck you, I doubt not, that the number of reversals is not large, but if all or many of these reversals resulted from errors in instructions, much necessity would be thereby shown for a change in our system upon this matter, but no change should ever be made in a law which is working satisfactorily.

In these reversed cases error in instructions given or error in refusing instructions requested was found in eight cases. Of the 211 cases examined by the appellate courts the charge of the court was found to be free from reversible error in 203 cases. Thus, the record stands: Correct charges given, 203; incorrect charges given or proper requests refused in a total of eight.

Let it not be thought that the attack upon instructions was successful whenever made, for, in far more than half of these 211 cases vigorous attacks were made upon the charge of the court, but the charge was found proof against such attacks in all but the eight cases mentioned.

We may regret that error was found in the charges in these eight cases, but we may well hesitate to change the law upon this subject, lest, in abandoning a system which is working with remarkable success, we invite evils greater than any that now beset us, and fly to others we know not of.

From these facts thus gathered from the records, I am constrained to answer that "errors in giving, refusing or modifying instructions" in criminal cases in this State are not "quite frequent."

Our Constitution provides that:

"Judges shall not charge the jury with respect to matters of fact, but may state the testimony and declare the law."

Jurors are the exclusive judges of all questions of evidence, and the statement of testimony by the court is seldom advantageous, and always hazardous. If the jury has not correctly understood the testimony as it has been given in the progress of the trial, little hope is there that that understanding will be improved through the court's repetition of it, and great danger is there that the court's statement of the testimony and the record will not always agree.

Well may all questions of fact be left with the jury, but the jury is composed of men untrained in the law, and a clear and not too long statement of the rules of law proper to be applied to the evidence must aid them.

This statement of the law by the court, however, should be as brief as the facts will warrant. The ground should be covered once, but not more frequently. The definitions should be couched in terms which the average individual may comprehend and expressions not familiar to all should be avoided with scrupulous care.

The charge to the jury furnishes no proper or appropriate place for learned disquisitions upon the law.

The careful, prudent and experienced judge well realizes that "examples may be heaped until they hide the rule that they were made to render plain," and thus avoids repetitions, restatements, multitudinous examples and involved definitions.

I have never known a judgment to be reversed because a

legal principle necessary to the jury's aid was not stated more than once, while many charges are open to criticism because the judge has not contented himself with such single statement.

I have seen the definition of "reasonable doubt" in the charge of the court given in a half dozen differing and varying forms, when any one of them would have been sufficient, and the several definitions, when read together, were so calculated to mislead and confuse that if Heaven's saints are ever sad, the spirit of Chief Justice Shaw must often grieve.

I have seen pages of manuscript devoted to a laudable but misguided effort to make the term "moral certainty" more clear than the words themselves, and, at its conclusion, the only thing which had been made sure was that the jury were morally certain that they did not know what the judge was talking about.

Though "circumstantial evidence" is not new, the efforts made to define it in some of the charges would fairly lead one to believe the author of the charge regarded himself in the light of a discoverer.

The trial judge must remember that the jury is composed of men of average intelligence, but untrained in the law, and the charge should be framed with these facts ever in mind, and delivered with the single purpose to so aid the jury that they may apply to the facts the proper legal rules. To attempt more is inexcusable, and to do less is indefensible.

Every crime known to the statute has been before the courts many times. Charges upon each have been given, and examined and criticised and approved time out of number, and small need is there at this day to discard in any case that which has been found good in favor of that which is untried.

As said by the Supreme Court of this State in a recent case:

"There is no good reason for using untried and dangerous paths when safe and well-traveled roads are equally at hand."

If trial judges, in framing their instructions, will use those which have met the approval of the appellate courts, small danger of error will there be, and less ground for the suggestion that our system of procedure in this regard should be modified. Success to that judge who feels that he can write more learnedly than those who have gone before have written, but let him make his first attempts elsewhere than in instructions to juries.

You remember that perplexed jury who, after listening attentively to the arguments of the District Attorney, and

after listening earnestly to the arguments of the attorney for the defendant, then struggled manfully to assimilate a very learned and a very long charge of the court, expressed, through their foreman, their predicament by saying: "If we do what the District Attorney has told us, a conviction will be the result, and if we do what the attorney for the defendant has told us, an acquittal will be the result, but if we do what the court has told us, God only knows what the result will be."

Some arguments may make confusion, but the instructions of the court should always make clear.

In earlier years the per cent of reversals by the Supreme Court was much larger than that shown by the figures I have given you. Not many years ago the per cent of affirmances was scarcely over fifty. In those years greater importance was attached to the mere fact of error, and less examination was made into the character of error for the purpose of determining whether or not it did contribute, or could have contributed, to the jury's verdict.

In earlier years our courts seemingly proceeded upon the theory that presumption of injury arose from the fact of error. Later the courts have reached the doctrine that a case will not be reversed because of an error, when it can be seen that the defendant was not prejudiced thereby.

In more than one-half of the cases affirmed error was found in the record, but the appellate court determined that such error had not resulted in defendant's injury, and was dismissed with the statement that the same was not prejudicial to defendant's rights.

A judgment should never be reversed merely because the record shows an error; that is not sufficient. The error should not be held reversible unless the record makes it appear that such error resulted in defendant's injury. In short, I affirm that the rule of the appellate court should be that an error will not be held sufficient to cause a reversal of the judgment unless the reviewing court can determine from the record that but for the commission of such error a different verdict would have been reached by the jury.

If the record shows, with reasonable certainty, that the same verdict would have been reached if such error had not been committed, the judgment should be affirmed. That error which has not injured should be held harmless, and such error should never be made to work the release of a defendant, or cause a new trial.

Stating the rule in another form: before an error of the trial court should justify a reversal, the reviewing court should be able to say, from an examination of the entire record, that

the same verdict would not have been rendered against the defendant if such error had not been committed.

Many instances might be cited where judgments have been reversed because of errors which could not have contributed to the result in the trial court. For example, cases have been reversed because the trial court refused the request of the defendant to instruct "That the testimony of an accomplice ought to be viewed with distrust", or "the evidence of the oral admissions of a party with caution", and, likewise, cases have been reversed because of the giving of those instructions when requested by the plaintiff, but later the appellate courts have held that neither the giving nor the failure to give these instructions is error. After many years, the courts reached the conclusion that it was not error to tell the jury to do that which they would as surely do without being told.

Anyone having the least experience with juries knows that they will, regardless of instructions, distrust the testimony of an accomplice, and view evidence of the oral admission of parties with caution.

Did time permit many other examples of similar character would be cited. I see no reason for any change in our law on the subject of instructions of juries in criminal cases. Instructions on questions of law are undoubtedly helpful to the jury, and, with reasonable care, error can be readily avoided.

Let us have no change in the law on this subject, but let attorneys engaged in the trial of criminal cases ask in the matter of instructions no more than honest and intelligent investigation leads them to believe that the law entitles their client.

Let the charge of the judge be prepared with the greatest of care, to the end that the charge will embrace only such instructions as are required by the facts of the particular case, and such as the decided cases show to be proper.

If this be done, and the law be faithfully and persistently pursued by all engaged in its practice, and wisely interpreted and faithfully enforced by all judges upon the bench, no occasion will be found for modifying our law relative to instruction of juries in criminal cases. (Applause.)

THE PRESIDENT: Studying the evolution of the law in its largest sense, the legal psychology, if you please, because that is the coming suggestion, I know of no more important function with which any administrative body has ever been clothed in the United States than the Interstate Commerce Commission, which regulates interstate traffic, and the various state commissions which are supposed to regulate interstate commerce. The supervisory government control over the ad-

ministration of a public utility, essentially in the line of the regulation of the matters that concern the body politic. I know of no more important legislation that this government as a union, as a national government, has ever inaugurated than the Interstate Commerce Act, and no more important amendment to such an act than the present amendment pending before Congress to the Interstate Commerce law.

I have had some experience with state railroad commissions—I do not refer to California railroad commissions, because until recently that was not known to exist. It is a pleasant thing to sit in your office and receive a peremptory subpoena from the Railroad Commission of Nevada, calling upon you to show cause why you should not construct an additional depot a mile and a half away from the one that you have already constructed. It is also pleasant to have a similar communication come in by mail, requesting you to show cause upon a certain date why your entire schedule of interstate rates between your terminals should not be cut down thirty per cent. That is what the railroad commission of Nevada does. I am unfortunately general counsel for a railroad that runs one hundred and forty miles into the State of Nevada. I am counsel for another one that did run eighty miles before the last freshets, and now it doesn't run at all. As general counsel for the Nevada Northern Railway is has been my pleasure to dance attendance upon those subpoenas issued by the Railroad Commission of Nevada at all hours of the day and night. For a busy commission and for an effectual commission, I do not know of its parallel in the United States.

The first question that was put up to me when the Nevada commission law was passed, and this is interesting to lawyers—the first thing I did was to grab up all the outstanding passes that had been distributed liberally around among the different employees and managers of the different departments of the corporation, and I said, “Gentlemen, no more passes”. I had hardly returned from giving that order until I got a communication from the general manager, “Can the wife of the counsel of the railroad company have a pass over this road?” I said “No.” In the first place, as a matter of practice, nobody ought to have a pass that does not earn it, and I do not believe the wives of legal counsel earn it. I believe the anti-pass legislation of the Interstate Commerce and of the State law which is framed on the same lines with this exception, that the Nevada State law permits the interchange of passes between counsel of the different roads—and my distinguished friend, the vice-president and general counsel of the Western Pacific will recall the fact that I returned

a pass to him tendered by the Western Pacific on the ground that it was against the Interstate Commerce law—is a very wise one. The Nevada commission is composed of one lawyer and two gentlemen who are not lawyers—one a professor of mathematics in the State University, to figure out the rate questions, and another a brakeman on the Southern Pacific road, an ex-division superintendent, and a good fellow. I received yesterday a letter from the general manager of the railroad company at Ely containing this quotation from administration letter No. 1 of the Nevada Railroad Commission: “The law of Nevada says that all of certain classes of people, employees and their families are entitled to passes. The lawyers and the surgeons of this road want to know if I can issue passes to their wives and their families. The ruling of the Commission was that lawyers’ families, surgeons’ families, the families of ministers, the families of preachers, and the families of everybody else could have passes.” I said, notwithstanding the distinguished wisdom of the ex-division superintendent of the Southern Pacific and the mathematician of the University and the lawyer of the railroad commissions, that the ruling was wrong, and “you issue no passes to the families of the lawyers.”

I don’t know what the Railroad Commission of this State has been doing recently, but I know what they ought to do. They ought to emulate the example of the Railroad Commission of Nevada and issue subpoenas to the railroad companies and ask them why they don’t reduce their rates thirty per cent. Perhaps the distinguished gentleman, a member of our Association, who is familiar with all of those details and matters concerning the Railroad Commissions, will tell us what they are doing, what they ought to do and what they won’t do. I have the pleasure of introducing to you Honorable Seth Mann. (Applause.)

Seth Mann, Esq., on “The Railroad Commission of California.”

MR. MANN. Mr. President and Fellow Members of the Bar Association: When I received the invitation to the honor of addressing this Association through our fellow member, Henry Eickoff, Esq., who acted as the graceful Ganymede of the occasion, I assure you it filled me with great gratification to learn that I should again have an opportunity to mount a favorite hobby.

I am particularly encouraged, however, at the outset, inasmuch as my remarks will be devoted to a recommendation

of the enactment of positive law in this State, by the statement made by Judge Angellotti in his very excellent address, that lawyers should be a factor in the making of proper laws. So I want to appeal to you in that very important function of your profession, which is an important addition to your general duties of expounding the law and which should engage much of your attention, the function of making proper laws.

The Constitution Should be Amended by Making the Railroad Commission Appointive.

My purpose is to show that any system of railroad rate regulation under the organic law of the State of California will be imperfect, and, to a large extent, ineffectual, unless the Constitution of this State is amended; and that this amendment should consist principally in making the office of a member of the Board of State Railroad Commissioners an appointive one. My position is that the members of the Board of State Railroad Commissioners should be appointed by the Governor by and with the consent of the Senate. At the last session of the Legislature of this State an amendment to this effect was presented in the Senate by Senator Campbell of San Luis Obispo. The amendment provided for the amending of Section 22 of Article 12 and the repealing of Section 23 of Article 12 of the Constitution of the State of California.

Section 22 is the present Constitutional provision defining the method of electing the members of the State Board of Railroad Commissioners and prescribing their powers and duties.

Section 23 is the section which districts the State into Railroad districts. And it may be said here that if it shall be ultimately considered advisable to appoint Commissioners from certain districts, it will probably be agreed that the formation of those districts should lie within the powers of the Legislature rather than be permanently fixed by an organic law since the changing conditions of population and general requirements of various sections of the State are varying from time to time, and a Constitutional provision is of too permanent a character to meet these changing conditions.

The amendment referred to (which was known as the Campbell Amendment, although it is printed as "Committee Substitute for Senate Amendment No. 4"), reads as follows:

“First—Section 22 of Article 12 is hereby amended to read as follows:

“Section 22—There is hereby created a railroad commission, which shall consist of three members and which shall be known as ‘The Railroad Commission of the State of California.’ The Commissioners shall be appointed by the Governor by and with the advice and consent of the Senate. Of the members of the Commission first appointed hereunder, one shall hold office until February 1, 1913, one until February 1, 1915, and one until February 1, 1917. The term of office of each Commissioner so appointed shall begin on the 1st day of February, 1911. Upon the expiration of each of said terms, the term of office of each Commissioner thereafter appointed shall be six years from the 1st day of February, immediately succeeding the expiration of the term of his predecessor. Whenever a vacancy in the Commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to the confirmation of the Senate. Commissioners appointed for regular terms, shall, at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices; but no person so appointed, either for a regular term, or to fill a vacancy, shall enter upon or continue in office after the Senate shall have refused to confirm his appointment or adjourned *sine die* without confirming the same, nor shall he be eligible for reappointment to fill the vacancy caused by such refusal or failure to confirm. The Legislature shall fix the salary of the Commissioners. The Legislature shall have the power, by a two-thirds vote of all the members elected to each house, to remove any one or more of said Commissioners from office for dereliction of duty or corruption or incompetency. All of said Commissioners shall be qualified electors of this State, and no person in the employ of or holding any official relation to any common carrier subject to the laws of this State or owning stock or bonds thereof or who is in any manner pecuniarily interested therein shall be appointed to or hold such office. No more than two of said Commissioners shall belong to the same political party. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. The act of the majority of said Commissioners shall be the act of said Commission. The Commission and each of its members shall have such

powers and perform such duties as are now or may hereafter be provided for by law.

"Second—Section 23 of Article 12 of said Constitution is hereby repealed."

The present Constitutional provision, Article 12, Section 22, provides that the State shall be divided into three districts as nearly equal in population as practicable, in each one of which one Railroad Commissioner shall be elected by the qualified electors thereof at the regular Gubernatorial election, and that his term of office shall be four years.

Railroad Commissioners should be appointed by the Governor, rather than elected. The proposed change in the method of selecting Railroad Commissioners is not only advisable, but necessary, if persons selected to fill this office are to be qualified to discharge its duties. The office of a Railroad Commissioner demands a person who has at least some familiarity with the special subject of freight rates and the methods by which they are made, and how conditions applying to them are to be determined. The chief objections to the unrestricted making of rates by the carriers themselves are two: First, that this system frequently results in the making of unreasonable rates; and, second, in the making of discriminatory rates.

In order that questions arising under either of these heads may be understood and decided, some special knowledge and experience in connection with the subject of railroad rates is a prerequisite. The subject is extremely special in its nature, and what might strike one unfamiliar with the subject as an extremely unreasonable rate, may turn out upon examination under the law and the facts applicable to the situation, to be entirely reasonable and just. A familiar example of this is the system of terminal rates applying at Pacific Coast cities, which are less for the longer haul than for the shorter haul. The rate applying from eastern defined territory—that is, from Colorado common points and points east thereof—to the ninety terminal points, known as Pacific Coast terminal points within the State of California, is less than the rate applying to points east of these terminals, such as Reno, although the distance of the haul is 150 to 250 miles further, yet this system of a lower rate for a longer haul when made under the different circumstances and conditions prevailing at the further-distant point, such as competition of carriers by sea, has been held by the United States Supreme Court to be justifiable under the fourth section of the Interstate Commerce law, commonly known as the "Long and Short Haul" clause.

Questions of discrimination also present so many ramifi-

cations that it is rarely that one case can be considered as a precedent for another, and each must be decided upon the facts that appear. Yet there are certain conditions which must be found in any case in order that illegal discrimination may result. There must be an actual movement of freight under the rate complained of; there must be some injury actually resulting in order to justify a finding of discrimination; and an inequality in rates of two independent companies may exist and yet neither be liable. These instances are mentioned merely to illustrate and indicate the large number of considerations which must be regarded in determining in any case whether or not a railroad is guilty of enforcing unjust and unreasonable charges or imposing undue discriminations upon its patrons.

It must be always remembered that the Railroad Commission is by no means a court of last resort, and that its decisions are worse than valueless if they are not founded in law and fact, so that they may be sustained when appeal is taken to the courts. A series of decisions by a Railroad Commission which were overturned by appellate courts, would result in no value to the people, but would involve large expense to no purpose. Accordingly it is clear that members of the Railroad Commission should be, if possible, men of experience in connection with freight and passenger tariffs and with the numerous other subjects which are connoted by these expressions, such as terminal charges and rules and regulations made by carriers which involve such subjects as demurrage charges, warehouse charges, elevator allowances, reconsignment charges, storage charges, transfer charges, minimum weights, live-stock transportation, car rentals, private car service, loading and unloading, and the like. And if a man of this knowledge and experience cannot be obtained, then one should be selected whose general experience or work in life has been such as to fit him for the ready acquisition of the fundamental knowledge required to any understanding of these subjects whatsoever. How is an elector, called upon to vote for whomsoever may be nominated to these positions, able to determine whether the candidate has such qualifications? It is impractical. The position therefore seems to be of necessity an appointive one; for the Governor of the State may investigate the qualifications of a possible appointee thoroughly before appointing him to such a position, and as he becomes then responsible for the work accomplished by this Board, it may be assumed, not only *a priori*, but also from the results obtained in the States where these Boards are appointed, that the resulting Board will be better fitted to deal with the complicated question of Railroad Regulation than one obtained under the elective system.

The reasons here applying are of greater force than those which will apply to any other office because of the peculiar special knowledge and qualifications which are required. The people may well and successfully elect the judges. The reputations and capacities of lawyers are generally well known. Positions within the line of other professions are equally well filled at elections, but here, where special qualifications are prerequisites, no system can ever be successful in obtaining good officers except the appointive system. To leave the matter to election is to leave it to chance.

An excellent example of the advantages of the appointive system has been presented to the people of California in the case of the appointment of Col. H. D. Loveland as a member of the State Board of Railroad Commissioners, made vacant by the resignation of Andrew M. Wilson, who was elected by the people of this district to the position. Since Col. Loveland's advent into office no one will deny that the State Board of Railroad Commissioners has assumed an activity not observed during fifteen years preceding his appointment. A number of cases have been decided by the Commission, and several are now pending before it.

Furthermore, both Hon. Charles A. Prouty and Hon. Franklin K. Lane, of the Interstate Commerce Commission, have expressed to me that, in their opinion, all things being considered, the appointive system is the best. The people of the United States are justly pleased with the tremendous change in railroad conditions which has been brought about by the activities of the Interstate Commerce Commission. Even the railroads themselves admit that, in abolishing rebates, in bringing about uniform systems of accounting and removing other difficulties under which railroads were laboring, but could not escape, prior to the Act, this great Congressional statute has been of large value to the carriers. This was substantially the statement of Mr. Julius Kruttschnitt of the Harriman System at the recent hearing before the Interstate Commerce Commission at Salt Lake City.

The Interstate Commerce Commission is an appointive body, appointed by the President of the United States, and the importance of its organization and its powers is constantly presented in the messages of the Presidents since its organization. Is it to be supposed that any large number of people would be heard to say that this appointive system should be abolished in favor of an elective one in the case of the Interstate Commerce Commission?

When the Railroad Commission is elected, the Governor is under no responsibility whatsoever for their acts or their omissions. Under the appointive system he would be re-

sponsible for all of them, particularly if he had the initiative in the removal of them from office.

Another distinct advantage found in the Campbell amendment follows from the fact that the Commissioners go out of office in rotation. This may be called the modern system of constituting boards of public officers. It thus follows that at all times there are at least two persons upon the board who are experienced officials.

The term of office fixed is for six years as against the present term of four. The term of office of the Interstate Commerce Commission is seven years, there being seven Commissioners, one being appointed each year. It is also provided in this amendment that no more than two of said Commissioners shall belong to the same political party. This carries out the idea of representation from the minority party, which is found in the Interstate Commerce Act where at least three of the seven Commissioners must be appointed from the minority party.

The amendment ends with the sentence:

“The Commission and each of its members shall have such powers and perform such duties as are now or may hereafter be provided for by law.”

This provision is significant in that it leaves to the Legislature the prescribing of the powers and duties of the Railroad Commission. The limit of this address will not permit a complete analysis of Section 22 of Article 12 of the Constitution of the State of California. This article is open to the objection, which is always a serious one, that it is legislation instead of organic law. I think it will be generally conceded that constitutional provisions which attempt to cover the details of legislation are not wise. In fact it may be said, as far as the State Board of Railroad Commissioners is concerned, that no constitutional provision whatever is necessary.

In the State of New York and in the State of Wisconsin, both of which States have excellent railroad commission laws, there is no constitutional provision upon the subject. Accordingly, pursuant to familiar constitutional law, all legislative power is left with the Legislature, who are then untrammelled in the matter of legislating upon this subject. In Section 22 we find this provision:

“Said Commissioners shall have the power and it shall be their duty to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies.”

This provision, which upon its face imposes upon the Railroad Commission the duty to establish by their own act all the rates of charges of carriers must be the source of much confusion and may, when the question arises, if it ever does, render all of the effective provisions of the present Wright Act ineffectual for any purpose. In order to carry out the other provisions of this section and to bring the carriers under the penalties of the section for failing to conform to such rates as shall be "established" by such Commissioners or charging rates in excess *thereof*, the Board of Railroad Commissioners have found it necessary to adopt and establish in some manner the whole existing schedule of the carriers in order that all of the rates may become "established." It is the rule of the Constitution that the Railroad Commissions shall establish the rates and fares, and the Railroad Commission are given by that section of the Constitution the right to impose fines up to twenty thousand dollars for a failure to conform to an established rate, or for a charge in excess of the established rate. Therefore it must be conceded that, in order that this penalty may lie, the rate must be established. If I am correct in that construction, see what follows. These rates, therefore, are rates which have received or must receive, in order to conform to the peculiar provisions of Section 22, the ratification and confirmation of the Board. It seems therefore that these rates may be claimed to be legally established rates established by the legally authorized body under the constitution of the State of California. The question therefore instantly presents itself: how can there be any illegality in the legally established rates, or, in other words, how can any of these established rates be held to be unreasonable or discriminatory by the very Commission which had adopted them? Or if the Commission be conceded to have this power, how can they award damages or reparation or impose penalties as provided in the Wright Act for charging such rates even though they may be found to be unreasonable and discriminatory if the same rates are at the same time to be regarded as rates "established" by the Commission? There are numerous other objections to the wording of this constitutional provision, a discussion of which time does not permit, but in a recent action brought by the Attorney General of this State against the Atchison, Topeka and Santa Fe Railway Company to enforce the penalty imposed by the present Railroad Commission of \$5000 for the giving of rebates (and which proceeding will probably ultimately find its way to the Supreme Court of this State, and possibly even to the Supreme Court of the United States, where many such cases

have ultimately gone) we shall, perhaps, if we live long enough, learn whether or not the provision of this Constitution authorizing the company to be fined not exceeding \$20,000 for each offense, has any legal validity. I am firmly of the opinion that these questions should be removed from our Constitution, and that the whole matter should be simplified and brought into harmony with the Constitutional provisions of other States of the United States, by the adoption of the Campbell Amendment set forth at the beginning of these remarks.

When this amendment is adopted (as I trust it will be at the next session of the Legislature of the State of California), we shall have the organic law of the State of California in a condition where we may proceed to the enactment of a logical and modern railroad regulation law.

The law of New York is an excellent example of this modern system. It is, together with the laws of other States, abstracted in the recent report of the twenty-first annual convention of the National Association of Railroad Commissioners in the report of the Committee on Powers, Duties and Work of the State Railway Commissions, at p. 81.

Under this law the Commission is appointed by the Governor with the approval of the Senate. The law is based upon the Interstate Commerce Act, and as there is no constitutional provision in New York upon the subject of Railroad Commissions, the Legislature was enabled, without constitutional restriction, to adapt the Interstate Commerce Law to the needs of the State of New York. Unquestionably the Interstate Commerce Act represents the best thought upon the subject of the regulation of transportation, and we have this great advantage, that it has been construed frequently by the highest court in America. If California were in a position where its Legislature could proceed to adopt a railway law which should be substantially in form and effect the same as the Interstate Commerce Act, it would be in line with the best modern thought upon the subject of railway rate regulation. The first and indispensable step in this direction is the adoption of the amendment to Section 22 of Article 12 of the Constitution of the State of California herein recommended to your consideration.

THE PRESIDENT: I am sure that the thanks of the Association are cordially extended to the distinguished gentlemen who have favored us this evening with the discussion of the topics which have been assigned to them. It is rather difficult to secure men who are interested enough to come before the Association and discuss these large problems, and the

Association is very much indebted to the gentlemen who have helped to make the evening a pleasant one.

I wish to invite the attention of the Association to some matters for a moment in connection with the administration of the Association itself. The San Francisco Bar Association has now reached a membership of over five hundred, I think something like five hundred and fifteen at the last count, and we are endeavoring to and shall endeavor to, in the next few months, show the work of the different committees and sections which have had charge of some of the matters that have seemed most important to be considered by the Association as such. It is expected that the work will go on so that at the meeting of the State Bar, which occurs in Los Angeles in November next, we shall have the crystallized judgment of this Association and different other legal associations who have received the printed copies of our record, in such form that we may make ourselves felt at the next meeting of the Legislature of the State. I desire to invite the cordial attention of the members of the Bar to the coming meeting of the State Association in Los Angeles in November, in order that the united association of the State may so present its views to the Legislature, for the adoption of such reasonable amendments as may seem proper to present and to have adopted at this juncture, to the end that some good may be accomplished, always reserving, however, in connection with the matter of reforms the suggestion that needed reforms cannot be accomplished in an hour or in a day. Those things must be patiently worked out, and we should not appear before the legislative department without having thoroughly digested the proposed changes in the law, and with the knowledge and ability to maintain the suggestions that we may offer.

We thank you very much for your attendance this evening, and now bid you good night. (Applause.)

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